

MINUTES

MONTANA SENATE 58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON FINANCE AND CLAIMS SUBCOMMITTEE ON DISTRICT COURT FUNDING

Call to Order: By **SEN. JOHN ESP**, on March 18, 2003 at 5:00 P.M.,
in Room 350 Capitol.

ROLL CALL

Members Present:

Sen. John Esp, Chairman (R)
Sen. Dan McGee, Vice-Chairman (R)
Sen. Jeff Mangan (D)
Sen. Linda Nelson (D)
Sen. Jerry O'Neil (R)
Sen. Mike Wheat (D)

Members Excused: Sen. Joseph (Joe) Tropila (D)
Sen. Edward Butcher (R)

Members Absent: None.

Staff Present: Prudence Gildroy, Committee Secretary
Lynn Zanto, Legislative Services
Valencia Lane, Legislative Services

Please Note:

Audio-only Committees: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: SB 218, 2/11/2003

Discussion:

Norman Grosfield, Attorney, advised he was retained by seven counties to act as counsel on a case brought forth by the ACLU regarding the public defender system. The structure in the counties is incorrect and the state has not taken responsibility in monitoring the public defender system. They think the case is defensible. What they are dealing with in **SB 218** is structure. In essence the state pays for the system anyway because they

reimburse the counties at a certain percentage. SB 218 provides a vehicle to address the complaints raised by the ACLU to provide a fair public defense system. He said it provides a uniform statewide system of public defender and it removes those the counties so inconsistent systems are not a problem. He felt there is a fair chance the counties would be dismissed from the case if this bill goes through. The ACLU is asking for prospective relief. He said they could do this in different ways, they could win the case, the state could set up a different structure or the court could mandate a structure. He said if the Legislature passed SB 218 it would address many of these issues, the counties would have a fair chance of being removed from the case and the state could have a good defense. It would remove the complaint that charged criminals in various counties are being treated differently. There would be a uniform review and control over all the public defenders. One of the complaints in the lawsuit that there is no real review by the state. SB 218 would be a good system and good public policy, he advised.

{Tape: 1; Side: A; Counter: 6.9}

SEN. JEFF MANGAN, SD 45, Great Falls, asked the representative from the ACLU to comment.

Beth Brenneman, ACLU, said it is not a guarantee that a structural solution will moot the case. One of the problems they is a lack of parity between the prosecutorial and the defense function. Unless this structure is adequately funded and insures parity then the problem may not be solved. The appropriation would be a key element as to whether or not it will serve as a vehicle to end this litigation. Any system where attorneys are not adequately supervised won't meet the standards and a centralized office for support is a good idea. It is good public policy to have some type of uniformity within the state and it also gets the counties out of the business of providing public defender services.

VICE CHAIRMAN DAN MCGEE asked if the **Department of Justice** received a \$10M appropriation and the **Chief Public Defender** received \$5M would that cause a lawsuit by ACLU.

Ms. Brenneman said in their depositions they have explored the different functions of the **Department of Justice** and civil defense functions are different from the prosecutorial functions. There is no parity between prosecutorial functions and the appellate defender offices or public defender offices.

{Tape: 1; Side: A; Counter: 11.6}

SEN. MANGAN advised there are concerns about the state's liability in this suit and whether or not a bill would affect the state's liability.

Mr. Grosfield said the state is a separate defendant and the counties are a separate entity. If the bill passes counties would have a fair chance of getting out of this lawsuit and the state might also be able to get out of the case as well. Even if the counties are removed the state is still the target defendant. The counties also have a cross claim against the state and if there was an adverse ruling against the defendants, both the counties and state, the state would be asked to reimburse the counties. It is the responsibility of the state to provide a good public defender system. **SB 218** is a good vehicle to either lessen the exposure to the state or remove them all together. The ACLU hired a major firm from New York City and should the defendants lose the case, under federal law they are entitled to attorney fees and costs. This is a complicated case that will require at least 100 depositions and will take at least a month to hear the case. If the plaintiffs succeed even minimally there would probably be millions of dollars of attorney fees. This bill would possibly remove the liability of the state and counties or lessen that liability and address complaints.

Ms. Brenneman said enacting a structure does not moot the claims. If the structure is not implemented in a way that provides constitutional representation to indigent clients then the claims are still alive.

SEN. MANGAN asked if the state is liable with or without **SB 218**.

Ms. Brenneman advised the state is required to provide indigent counsel.

SEN. MANGAN noted he met with **Ms. Brenneman** and **Mr. Grosfield** and it was his understanding if they put a system in place that works it would mitigate some of the damages and issues that are currently in the case.

Ms. Brenneman said institutional reform is a good first step but won't necessarily provide adequate counsel.

Mr. Grosfield said it could lead to a reasonable settlement between the plaintiffs and defendants.

SEN. JOHN ESP, SD 13, Big Timber, asked if indigent defense was criminal or is it civil.

Ms. Brenneman advised it is criminal and some misdemeanor that could lead to a felony charges such as a DUI, for example.

{Tape: 1; Side: A; Counter: 19.5}

SEN. JERRY O'NEIL wondered if indigent defense was provided for by the state at poverty level or half poverty level, etc.

Ms. Brenneman said she didn't know for sure.

Mr. Grosfield clarified if a defendant can prove they have no assets or adequate assets to cover a defense they are entitled to a public defender.

SEN. MANGAN asked what happens if they don't take a serious look at state assumption in the public defender system.

Ms. Brenneman said she felt litigation would continue and they could ask the state to devise a plan for a possible remedy.

SEN. ESP said they have discussed instituting a system two years from now and asked if that would be a mitigating factor.

Ms. Brenneman said they would have a hard time with that because they have cases pending and that would not be fast enough for clients.

Ms. Grosfield felt that it would compound the problems for defendants in the staet.

VICE-CHAIRMAN MCGEE advised he would like to have discussion on **SB 218** and the gray bill.

SEN. MIKE WHEAT advised he had feedback from many of the players concerned with the gray bill and felt that they may be ready to act on the bill by next meeting.

SEN. MANGAN felt it was imperative to get the bill out of the committee and to **Judiciary** or **Finance and Claims** so that it could be acted upon. He has not been able to share the revised fiscal note until it is official..

{Tape: 1; Side: A; Counter: 27.3}

VICE-CHAIRMAN MCGEE felt the bill needs to go back to **Senate Finance and Claims Committee** because they are dealing with the money issue and felt it would be best handled in that committee.

SEN. MANGAN said it doesn't matter.

CHAIRMAN ESP noted it had be re-referred to **Senate Finance and Claims**.

SEN. MANGAN said if they are going to take a serious look at **SB 218** they need to decide about starting the process in this biennium on July 1st and fully implementing it a year from that date. If it is put off, he felt they would be changing the direction of the bills.

SEN. MCGEE asked how difficult is it from an IT standpoint to set up the public defender system on the SABHRS system for tracking.

Brian Wolf, Information Technology Service Division, Department of Administration, advised if they are talking about a bill and collect system or an accounting system the functionality is in SABHRS.

SEN. MCGEE stated it would be an appropriation.

Brian Wolf indicated SABHRS has an appropriation function.

SEN. MCGEE advised a key component to **SB 218** is how quickly an agency can be set up and an IT system put in place so that people are being paid in a timely matter. He cited the lawsuit and the issue of proper indigent defense, etc. He asked for assurance about oversight.

Mr. Wolf advised they have been working already making sure employees are getting paid, etc. On the IT side of it they would have to work to get the state accounting software set up to pay people etc. and they would also need to decide how the personnel in the counties will access that software, etc.

{Tape: 1; Side: B; Counter: 6.5}

SEN. MCGEE spoke about creating a new department called the Chief Public Defender's office to communicate with all of the Public Defenders out in the field; they have to be paid and they are called at any time to serve as counsel, etc. He wondered how long it would take to set up the system.

Steve Bender, Department of Administration, advised setting up an accounting system and moving 49 people to state employees could almost be done on automatic pilot. His concern is they have to hire a Chief Public Defender and this may take some time.

SEN. MCGEE asked if the date for implementation was July 1.

SEN. WHEAT advised part of it would be implemented this year such as hiring the Chief Public Defender and the rest would be implemented on July 1, 2004.

Mr. Bender said it is the standards and the policies that are going to take some time. When they prepared the fiscal note they did not include any extraordinary information technology costs. For example, they do not have a case management system. He referred to HB 18 which concerns court automation.

SEN. MANGAN said if the system remains the way it is and they are trying to build their information technology base for the administration of the courts, would indigent defense be included in those costs under HB 18.

Chief Justice Karla Gray, Supreme Court, said no because only the cost of indigent defense came over and not any of the employees. She said the need to provide employees with computers and all the components didn't come over because they did not have any state employees in the way of public defenders, only costs.

SEN. MANGAN asked if they knew that they were going to have public defenders as state assumption why was that not looked at and included when preparing HB 18.

Justice Gray advised the public defenders were not included in SB 176 and this is why **SB 218** creates a separate commission and assumes those employees.

SEN. MANGAN asked if they discussed in SB 176 if public defenders would be state assumed in July of this year.

Gordon Morris, Montana Association of Counties, said there is some confusion in regard to SB 176. When SB 176 was originally drafted, public defenders were initially in there and they were taken out. He pointed out in SB 176, funding for the public defender system language sunsets in July. Therefore the state will have some sort of obligation after July 1.

{Tape: 1; Side: B; Counter: 15.0}

SEN. MANGAN asked when they take a look at assuming the four major areas, Helena, Great Falls, Billings and Missoula, what is the status of information technology in the counties.

Ms. Morris said systems are in county facilities and either owned by the county or leased. They are on a county system and have access to the state computer system. He said most of the other counties are in a contract situation.

SEN. MANGAN asked if they could get in touch with the five major counties to find their status with information technology.

Mr. Morris advised he could do that by the next day.

SEN. MCGEE said if they had a July 1 deadline to create a department, could the **Department of Administration** do it.

Mr. Bender said no.

Mr. Morris advised their obligation if they do nothing is to pay the bills without regard to the language to the extent money is available. They are on the hook for whatever the cost is on July 1.

SEN. MCGEE asked again if a Public Defender Commission could be created by July 1 and SB 218 implemented.

Mr. Bender advised they could pay the bills beginning next fiscal year. They would have to do some homework to figure out how to structure budgets and account for money. The time consuming part is creating the rest of the office. The department is in the business of paying bills.

SEN. MCGEE said they have a Chief Public Defender but they also discussed having an administrator. He wondered if **SB 218** talks about an administrative officer.

SEN. WHEAT said it does, but it could be more specific. He asked if they implemented **SB 218** and hired a Chief Public Defender by July 1 to work with the department to set up the system, implement standards, and policies and procedures, could the rest of the system be up and running by July 1, 2004 and pay the bills at the same time.

Mr. Bender indicated they could get a person hired by July 1, but the rest may be a problem.

SEN. WHEAT asked if they could have it all done in a year.

Steve Bender said the court system is beyond his expertise.

Brian Wolf, CIO, Information Technology, said from an IT perspective, those are to be requirements driven issues and knowing what those requirements are and if the funding is available is important. He said they would have to connect people to **SummitNet** to access the state network if they don't have that connectivity. Then the question becomes do they have access to

those facilities within the court structures that they have right now. His expertise is not in the court system either, but he assume they would need access to case management tools. These are issues of concern and would have to be addresses with before they could give hard dates.

{Tape: 1; Side: B; Counter: 23.3}

SEN. MCGEE advised he asked **Mr. Wolf** to be here. He wants to know how well they can communicate out in the hinterlands--a key aspect of the whole thing. He wants **Mr. Wolf** to work with the department, the **Supreme Court** and the district courts.

SEN. WHEAT said they are going to need IT work and the person who gets hired as the Chief Public Defender. They will be the one to take care of the integration of the court system and doing the legal work. People like **Mr. Wolf** will set up the system. The Chief Public Defender would be the one who would help with developing the standards, and policies and procedures.

CHAIRMAN ESP asked **Mr. Morris** to comment.

Mr. Morris said they have been discussing whether they could have someone hired by July 1. The bill renames the commission from appellate to trial and having combined duties. The Public Defender Position becomes effective on July 1. They are not going to have to hire someone as soon as the session ends because that position would not be available until July. They have to worry about paying the bills. Then they can hire someone to work on all of the policies, procedures and contracts that they have been discussing. He said the big concern is if they will be ready to pay the bills come July 1. The court had the same problem with implementation of SB 176. They had a year of startup and it worked.

SEN. MCGEE asked if they have indigent defense already in the Judiciary.

Justice Gray advised they have the costs, but not the structure, commission, Chief Public Defender or bodies and this bill would move the costs, and bring on employees and the structure and attach it to the **Department of Administration**.

CHAIRMAN ESP asked if it would cost more than the way they do it now.

Justice Gray stated there is no question that it would.

Mr. Bender said their life is much easier if they know what bills are their responsibilities. He said if it is a technical accounting issue of just paying bills it is a lot simpler.

SEN. O'NEIL asked if **Mr. Wolf** would be taking over the case management system.

Mr. Wolf said it was assumed that it needed to be included and he wanted them to understand that they do not have that functionality today. He wondered if this was something that was already done with case management tools that the Supreme Court was putting out there.

Justice Gray said the case management system that they have in the district court portion of the Judicial Branch is a judicial case management system. It is not intended for a function that is not a judicial function. She felt some sort of case management system would have to be developed for the whole public defender system. Their case management system would need to be separate and apart from the Judiciary's because they are an Executive function.

{Tape: 2; Side: A; Counter: 3.7}

SEN. O'NEIL asked if they could buy this case management system off of the shelf or would they have to develop it.

Mr. Wolf said it would take some research, but he felt it could be bought off the shelf and then they could customize it.

SEN. O'NEIL asked how much it might cost.

Mr. Wolf said he did not know at this point.

Mr. Bender advised they have other systems coming their way such as the K-12 insurance pool and offices of state government and these tasks tend to add up .

SEN. MCGEE said if they are already using a case management tool specifically designed for court work why wouldn't they use that system.

Mr. Wolf said they may be able to do that, but they need to see what the requirements are.

Ann Mary Dussault, Chief Administrative Officer, Missoula County, stated they have an in-house public defender system. She said the discussion of a case management system is a good one and will probably look like something that is in every attorney's office

in the state. She said the system is different than what is used in the court, essentially it is a calendaring and managing system of the hundreds of cases that each attorney has. Missoula County has developed its own over time and they would be looking to get out of it because they are migrating to many off the shelf systems. Lewis and Clark County does not have a case management system and it is something that would have to be developed. She said Missoula County uses **SummitNet** and she suspected every county does. They are all connected in Missoula County, their computers have been upgraded and they would be happy to give them to the state.

CHAIRMAN ESP advised he is trying to envision what the state is expected to provide in the hinterlands, such as in the judicial district for Plentywood.

Ms. Brenneman stated when they talked about a possible remedy in this case, they have not said the only remedy is a state assumption. Many states have looked at regional public defender directors and there are other systems that provide autonomy. They did not envision state assumption as being the ultimate remedy for this case; there are definitely some problems with rural attorneys. In the system right now looking at the prosecutorial function, the Attorney General's Office serves to support many of the outlying prosecutors and provides experts and help in trial situations.

CHAIRMAN ESP asked about a system that contracted with the larger counties to provide a service for the state; they would still be county employees. There will be minimum standards for attorney's to adhere to, etc. and the state would contract with the smaller counties to defend most cases and then they would have people who are situated regionally that could help with capital cases, etc. in those rural areas. He asked if this would meet the expectations of the ACLU for the state or counties.

Ms. Brenneman said as long as there is a balance between the prosecutorial and the defense function, adequate funding on both sides, adequate supervision, adequate standards, and basically insuring that the function is provided in a constitutionally adequate fashion. Autonomy is a very important element. In many of the counties the problem is the concern about spending too much money for the defense function. When there is a system where the defense function is concerned about local politics as opposed to adequately representing their client, people are self-censoring and deciding not to file motions when appropriate. Autonomy is a very important element and is a benefit of this system because they have someone who is a state employee as

opposed to a county employee. This isn't the only system that would give that benefit

{Tape: 2; Side: A; Counter: 13.9}

CHAIRMAN ESP felt the prosecutorial functions in counties are sensitive to concerns about funding also.

Ms. Brenneman agreed.

CHAIRMAN ESP said if what they are looking for is a balance and if the prosecutorial function is concerned about finances, why wouldn't it be appropriate that the defense function would be also.

Ms. Brenneman acknowledged everyone has to be concerned about fiscal issues but in most counties the Public Defender does not make as much money as the County Attorney and this is one way in which there is not equity between the two functions. The public defender is required to file motions, and make hassles for the prosecutorial function and because that position is not the most favored in a community, it makes it more difficult for an individual contracting to do that service to zealously do that job when there are profound fiscal concerns. The prosecutor is an elected public official and generally are more favored in a local setting. There is less pressure for them to file fewer cases.

CHAIRMAN ESP said in smaller counties such as Sweet Grass they have had a part time county attorney and it was usually the new guy in town and needed to build a practice. He wondered why the prosecutorial side is well trained and has standards they have to adhere to and the defense doesn't.

Ms. Brenneman contended in most prosecutor offices there are certain requirements for experience before they do particular kinds of trials, formal standard procedures, periodic reviews and support from the attorney general's office. She said that is not the case in the public defender function and there are broad variations from county to county.

CHAIRMAN ESP said in some cases in Sweet Grass County the attorneys who are appointed to be indigent defense attorneys might be more skilled than the prosecutor. He is trying to understand why it would be better if all of these folks were state employees and would travel to trials in different places.

Ms. Brenneman repeated she didn't know if this was the appropriate remedy. They have suggested many different remedies and those are some of the difficult questions. One of the

advantages of bringing litigation in this context is that they have a court looking through expert reports and will have an opportunity to assess the program and construct a remedy. She felt it was difficult to construct a remedy in this context because right now there are 50 different systems and the best way to handle each county is a very difficult task.

{Tape: 2; Side: A; Counter: 20.0}

CHAIRMAN ESP asked about other models and asked for some literature for the committee.

Ms. Brenneman said she could provide some literature from Wyoming and New Mexico that may be helpful.

SEN. MANGAN said suggested they submit this bill on Thursday with all the questions answered. He didn't think it was ever intended for a state employee to live in Sweet Grass County as a public defender. He expressed frustration and felt they should present the bill on Thursday and if they don't want to do state assumption just get it on the table and do it or not do it.

CHAIRMAN ESP explained he is trying to figure out a way to contract with these folks rather than having 49 state employees. He felt some of the things some counties are doing are more efficient given the system and how people interface with the system. He advised it would allow some efficiency with indigent defense and the courts of lower jurisdiction. He is trying to do that within the context of moving on to something else at a later time.

SEN. MANGAN said he does not have an issue with that. They still have to figure out what system they are going to be under and he doesn't feel they have the time to do it. It all comes down to cost and they are micro-managing everything when it comes down to cost. He suggested having a hearing like they would on a normal bill and have **SEN. WHEAT** submit the bill to the subcommittee on Thursday. He didn't think it would save a dime either way. He said every other day they are going in a new direction and they are out of time.

CHAIRMAN ESP said what he suggested yesterday was to look at a reimbursement for the next 18 months and then work into this. By then they would know what real costs were, etc. He felt they would have a hard time convincing the Budget office and Governor's office that this is going to cost a whole lot more than it does under reimbursement.

SEN. WHEAT said he wondered what the fiscal note would be if they don't do something and the lawsuit goes forward and the state loses, has to pay and the court describes the system to build. Expert witnesses are studying the state and the system and the state will have to pay for it. They are not going to accomplish autonomy by continuing to reimburse and without state supervision. He felt this is the best system not only for the purpose of providing indigent defense statewide but taking care of the lawsuit.

SEN. O'NEIL said he wondered what type of case management system is used in Yellowstone County. He wondered about expanding that system statewide easier than starting a fresh system.

SEN. WHEAT asked if he meant the computer system.

SEN. O'NEIL said the computer system, the case management system, the hierarchy, etc.

SEN. JOE TROPILIA said the more they discuss this the more formulas are thrown into the equation. He felt they should get something going and get it out of committee.

SEN. MCGEE commented they are going to be driven by the lawsuit whether they go forward or it is settled, etc. It is frustrating that the ACLU didn't come to the Legislature with a proposal for this structure but chose to sue and pay corporate attorneys from New York to sue the State of Montana. It is frustrating as a Legislator because more and more the Legislature ends up doing whatever the court has decided. He agreed they will have to build a system. A year's delay would be a faulty maneuver, but he did not favor going much beyond the budget office. There has to be some efficiencies built into this system so they are not spending untold amounts of money and the taxpayer also needs to be represented.

{Tape: 2; Side: B}

SEN. MANGAN felt it would be beneficial to the committee to allow him and **Sen. Wheat** to present the bill, have some discussion, answer specific questions and address certain aspects of the bill.

SEN. LINDA NELSON, SD 49, Medicine Lake, asked if there is time to get the word out for people who would like to testify, etc.

SEN. MANGAN said it wouldn't necessarily be a hearing, but present the bill in that format.

SEN. MCGEE asked if it would be presented with the idea of making a recommendation and taking executive action.

SEN. MANGAN advised he could discuss some of the implications in a more formal manner.

Justice Gray said her question is that after they have wrapped up the public defender commission bill, is it this sub-committee's intention to do anything with the court's proposed budget. Without regard to how the fiscal note turns out on the public defender commission, they are still under-funded by several million dollars. They have offered a proposal for the subcommittee and then a second proposal that does not contain a fallback to the counties. The House budget subcommittee left the Judiciary was at the Executive's budget level and then deferred any further action to this subcommittee.

SEN. MCGEE responded it is incumbent on the subcommittee to make a recommendation to the **Senate Finance and Claims** committee.

ADJOURNMENT

Adjournment: 6:40 P.M.

SEN. JOHN ESP, Chairman

PRUDENCE GILDROY, Secretary

JE/PG

ADJOURNMENT

Adjournment: 2 A.M.

SEN. TOM ZOOK, Chairman

PRUDENCE GILDROY, Secretary

TZ/PG

EXHIBIT (fcs57bad)